IN THE SUPREME COURT OF THE UNITED STATES

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ABU-ALI ABDUR' RAHMAN, :

Petitioner :

v. : No. 01-9094

RICKY BELL, WARDEN :

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Washington, D.C.

Wednesday, November 6, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

JAMES S. LIEBMAN, ESQ., New York, New York; on behalf of the Petitioner.

PAUL G. SUMMERS, ESQ., Attorney General, Nashville, Tennessee; on behalf of the Respondent.

PAUL J. ZIDLICKY, ESQ., Washington, D.C.; on behalf of amici curiae, State of Alabama, et al.

C O N T E N T S

P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 01-9094, Abu-Ali Abdur' Rahman versus Ricky Bell.

Mr. Liebman. I think the Court would like to hear argument on the questions we asked for supplemental briefing on, as well as your original petition.

ORAL ARGUMENT OF JAMES S. LIEBMAN

ON BEHALF OF THE PETITIONER

MR. LIEBMAN: Okay. Mr. Chief Justice, and may it please the Court:

The question I'd like to take up first is why, in our view, the unusual circumstances of this case satisfy the two sets of demanding requirements that are on the petitioner here to succeed: 1) he has to show that this is not a successive petition, and 2) he then additionally has to get over the high hurdle that 60(b) imposes.

Let me, though, go first to the jurisdictional questions that Your Honor referred to. This case was in the court of appeals in three ways. It was there because Mr. -- the petitioner here went into the district court and he said, here's my 60(b) motion, I'd like to get 60(b) relief.

The district court -- and this is on pages 42 through 44 of the record, of the joint appendix -- said very, very clearly that it was going to make two rulings. First it said, this is not a Rule 60(b) motion, it is something else, it's a successive petition. Because it's a successive petition, you cannot get 60(b) relief in this court, and I'm going to refer or --

QUESTION: That's the district court judge?

MR. LIEBMAN: Right. What I -- but what that did, Your Honor, was to establish a final disposition. It terminated all of the petitioner's rights under 60(b). There were no rights left. He told the district court --

QUESTION: Couldn't he have moved to -- in the Sixth Circuit -- to remand the case if he disagreed with that?

MR. LIEBMAN: He did. He did, Your Honor.

QUESTION: Well, but that means that the district court's decision was not final.

MR. LIEBMAN: Well, it was final for purposes of the 60(b), because the -- for purposes of the district court's view there could be, would be, never could be any 60(b) relief.

QUESTION: But it wasn't a final judgment in the sense that an appeal could be sought from that, because it was transferred. The district court judge transferred it.

He didn't dismiss the 60(b) motion, which I would have thought the district court might have done, and then it perhaps could have been appealable.

MR. LIEBMAN: Well, Your Honor, all of that's right, and if the belts don't work, let's go to the suspenders. He -- the case was transferred to the court of appeals. The court of appeals, however, could not take jurisdiction over the case unless the prerequisite for its jurisdiction was established, and if you look at 2244(b)(3), which is in our appendix to our brief at page 1a --

QUESTION: Page 1a of the blue brief?

MR. LIEBMAN: 1a of the blue brief, it's very clear under (b)(3)(A) that it has to be a second or successive application before the court of appeals has any jurisdiction to do anything with it, so its jurisdiction turns on the question whether it was a successive petition or not. If it wasn't one, it could not act under this statute and would have to remand back to the district court. That's exactly what happened in the Martinez-Villareal case.

QUESTION: Well, what -- what does the statute, the AEDPA statute contemplate? That somebody in this defendant's position could have applied to the court of appeals for permission to file a successive petition?

Could that have been done here?

MR. LIEBMAN: Yes.

QUESTION: That was not done?

MR. LIEBMAN: It was not done here because he was saying all along this was not a successive petition, if it was, he would not satisfy it. He --

QUESTION: Go ahead.

MR. LIEBMAN: He was saying that he did satisfy the requirements of 60(b), that the statute recognizes a difference between certain --

QUESTION: Well, then, to get an appeal on that -- it sounds so complicated, because the law has gotten so complicated with AEDPA, but maybe he should have sought transfer back to the district court so the district court could dismiss it and give something from which an appeal could be taken.

MR. LIEBMAN: Oh but, Your Honor, in Martinez-Villareal, I think it's very clear this case is exactly the same as Martinez-Villareal, which this Court ruled expressly on the -- the first question it took up was the jurisdictional question. What happened there is that the petitioner went to the district court, the district court said, this is a successive petition, I'm transferring, you can't be in this court.

He then took an appeal, and he went up on a

transfer saying, okay, you've got the transferred motion in front of you.

The court of appeals actually dismissed the appeal saying, we don't have that, but it decided in the context of the transfer -- and this is very standard procedure here now under AEDPA -- it decided, first question first, do we have jurisdiction, and it said, you know what, we figured out that we don't have jurisdiction because this is not a successive petition, so we remand back to the district court.

This Court then took cert on that question, and the first question it asked was, do we have cert here because of subsection (e) here, and it said, we do have cert here because (e) is very clear. The grant or denial of authorization can't come to the Court.

QUESTION: Well, let's go back to (3)(A) for a minute, Mr. Liebman. It says -- as you point out -- before a second or successive application permitted by this section is filed in the district court. You say all of that is a prerequisite, I take it, for the court of appeals acting, but supposing it's a second or successive application that is not permitted by this section. That wouldn't deprive the court of appeals of the jurisdiction to say no, would it?

MR. LIEBMAN: Absolutely. In fact, it has the

obligation, not just the jurisdiction, to decide whether it is a successive petition, because if it isn't, it can't decide the case, because then it's got to start with the district --

QUESTION: Well, but -- so then the first, the -- the first clause of (3)(A) is not really, strictly speaking, entirely jurisdictional.

MR. LIEBMAN: Oh, well I -- I'm not actually sure it's the first clause. It says that the applicant shall move in the appropriate court for an order authorizing that. That's what essentially gives the court the jurisdiction, but it's got to be for an order authorizing what qualifies under the statute as a second and successive application. This was not a second and successive application. Therefore, as in Martinez-Villareal --

QUESTION: Well, that's, of course, part of the issue in the case.

MR. LIEBMAN: Right, but that -- his position was it was not, and therefore the court needed to dismiss that case, and it had two options at that point. It could either remand it back, which is the majority approach, or it could simply have dismissed, and then he could have gone back and filed in the district court again, which is what a few courts do.

QUESTION: Mr. Liebman, initially in this case, when the district judge transferred -- I think it got one on the State's recommendation that that's how you handle these cases. On behalf of the defendant, did anyone ever say, please enter judgment against me under 60(b), I want to make this -- test whether this is a 60(b) case or a habeas case?

MR. LIEBMAN: That did not happen, Your Honor, although petitioner understood the court's decision, if you look on pages 41 and 42, to say this -- it expressly says, you cannot file 60(b) here in this court because it's automatically successive. You cannot do it. You will never get any rights under 60(b).

QUESTION: But he could have asked to test that. He could have said, please don't transfer.`

MR. LIEBMAN: He could have, but in -- Your Honor, in the Martinez-Villareal case, there was no such question, no -- no --

QUESTION: -- see what Martinez-Real has to do with it. I may be missing it, but I thought that in -- in this case, the reason that you cannot appeal from the court of appeals order refusing to give you permission to file a second habeas is because there's a statute that says you can't come to this court when a court of appeals refuses to give permission on second habeas, and none of

that was involved, to my knowledge, in Martinez-Real.

MR. LIEBMAN: Oh, yes --

QUESTION: That was a question about whether or not there was a premature decision, or whatever it was, and they sent -- the court of appeals sent it back for adjudication on this issue.

MR. LIEBMAN: No, Your Honor.

QUESTION: No, it's -- I'm not right?

MR. LIEBMAN: The provision (e) here says that the grant or denial of an authorization cannot come up to the Court on cert, so the fact that the court there in --

QUESTION: You mean, Martinez-Real was a grant of a petition for second or successive?

MR. LIEBMAN: No. It was --

QUESTION: Well, then, what has that statute to do with it?

MR. LIEBMAN: What it said was -- and this is what the Court said in Martinez-Villareal quite clearly. There's a threshold question. The threshold question is, do we have in front of us a second or successive petition.

QUESTION: In Martinez-Real?

MR. LIEBMAN: Yes. Yes, yes, yes. That was the question there, because Martinez-Villareal filed a request to --

QUESTION: And what did the court of appeals say

was the answer?

MR. LIEBMAN: It said, the answer is, this is not a second or successive petition.

QUESTION: Fine, so then the statute doesn't apply, I guess --

MR. LIEBMAN: Oh -- but here the court said -- if I can be clear about this -- the court said two things, and it said them actually in different orders. January 18 order, it said, this is a successive petition, so now we've got to go to the gateway question of whether you can get into court. And then a couple of weeks later, actually almost a month later, February 11, it said, you don't meet the gateway requirement.

QUESTION: I -- I just don't see how you get around the statute that says that you can't come here after a court of appeals either grants or denies the second or successive.

MR. LIEBMAN: Well, that's what I'm --

QUESTION: Which wasn't at issue, I take it, in the other case.

MR. LIEBMAN: That's what I'm trying to say. The very first thing that our cert petition says in this case is, we are not asking for cert from the question of whether or not we meet the gateway requirement.

QUESTION: Yes, but you -- one doesn't really

ask for cert from -- from a question. One asks for cert to review an order, and the order of the court of appeals is an order granting or denying.

MR. LIEBMAN: This order had multiple parts, Your Honor. It was actually divided up into multiple parts, and what he said was, we are asking for cert from some parts of the order, segmented out and given paragraphs. We are not asking for cert from other parts of that decision.

QUESTION: But I think the question is whether you can ask for cert for any -- from any -- part of it in view of the provision of the statute that it's not -- I just don't -- I'm not sure you can bifurcate the order and say, we're not challenging the denial, we're challenging, in effect, the reason for the denial.

MR. LIEBMAN: Well, this was not a denial. What the statute says -- and I think that's really important -- is the grant -- I'm reading (e), as we go over from (1)(A) to (2)(A). The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable, but he was not appealing the grant or denial. He was appealing the preliminary question whether it even was, whether the court even could have taken jurisdiction of that because it had a second or successive --

QUESTION: That's not a judgment. You -- you appeal judgments, you appeal orders, you appeal dispositions of the lower court. You -- you don't appeal statements or -- or expressions. You -- you appeal dispositions. The only disposition here was the denial of the -- of the application.

MR. LIEBMAN: Well, Your Honor, then let me go to the garter if the belts and suspenders haven't worked here. Petitioner filed a motion in the court of appeals on his original appeal, and he said, in this appeal, what we would like you to do is, rather than issuing the mandate on the judgment that you issued before, which went up on cert, we would like you to remand this case in order for the court below to take up these issues, whether on 60(b) or in other ways, and the court denied that motion.

It didn't say why, but it denied that motion without, expressly in regard to that, doing any kind of gatewaying. It just said, we deny it.

Now, it gives the reason in the earlier January 18 order that it thought that any post judgment motion in one of these cases was automatically successive, and that's our first question --

QUESTION: All right, but --

MR. LIEBMAN: -- which is, that was a mistake --

QUESTION: -- on that -- now, this will get to

the merits, which I'm sure you'd like to get to --

MR. LIEBMAN: Yes.

QUESTION: -- but I thought that the argument that what the court of appeals did was right is roughly the following, that what your client should have done, or the way it should have worked is that the district court initially dismissed -- dismissed on the ground that there was a procedural default -- his initial parts of the initial petition, because, said the district court, he didn't exhaust those, and he can't do it now because the time is up, and your client never appealed that ruling in -- the first time.

What he should have done is appealed it. Then, when he asked for cert and the Tennessee statement came down, he would simply have amended his certˋ petition and allowed us to GVR in light of our case in Tennessee, but he couldn't do that, because he hadn't appealed that in the first place, and therefore he had a final ruling, a final judgment against him on that issue, and -- and that's why -- that's why what the court of appeals did was right, and that's also why it really is a second and successive, because after all, you -- it's -- you want a district judge to reopen a judgment where he made a mistake but you didn't appeal it.

MR. LIEBMAN: Your Honor, you're absolutely

right, the premise, which is that Rule 60(b) or related motions in the court of appeals cannot be used to fill the office of an appeal, but there's a very established doctrine there. It came up in the Muniz case, in the Blackmon v. Money remand that this Court made, and the question there is whether it was reasonably available to him at that moment to make an appeal. If it was, 60(b) doesn't come into play, and that's perhaps the most important question in this case.

As of the time Mr. Abdur' Rahman filed his brief, his first brief, opening brief in the Tennessee -- I mean, in the Sixth Circuit on August 5, 1999, this Court's O'Sullivan decision had come down two months earlier. O'Sullivan read a rule of Illinois procedure establishing a discretionary review process that is identical in terms. The State of Alabama has actually gone through the terms in its brief and shown that they're identical.

This Court said, and I quote, without more, those words are not sufficient to tell us that that discretionary procedure is outside the ordinary post-conviction review process in that State. In this State of Tennessee at the time, there was that rule, identical to the rule in O'Sullivan, and nothing more in the law. In fact, the State concedes in its brief that there was

nothing in Tennessee law at the time besides the rule.

So it was not available to him at that point for the very reason that if he had made that argument, it would have been a frivolous argument because it would have run foursquare into the precise holding of a decision of this Court but two months before. It was only when Rule 39 came down after the appeal was over, while the case was on cert, that it said no, no, no, no, the law of Tennessee has been since 1967 that our discretionary review procedure in Rule 11 has never been part of the regular and routine State post-conviction review process that we have --

QUESTION: Mr. Liebman, we've decided a couple of cases, one about 30 years ago, Harris against Nelson, and then another case called Pitchess, in maybe -- that indicate that the Federal Rules of Civil Procedure, and particularly 60(b), do not apply if they conflict at all with the habeas regulations. Now, you don't cite either -- either of those cases in your brief.

MR. LIEBMAN: Yes, we do. We cite --

QUESTION: I'm sorry. I --

MR. LIEBMAN: We cite both of them on --

QUESTION: I didn't see them in the index.

MR. LIEBMAN: Well, I believe that they are cited in our -- well, I guess you're right. I thought we

had cited them in the reply brief, but we make reference to them where we point out, if I can find it here -- yes, we do, Your Honor. On page 3 of our reply brief, the yellow brief, we cite Pitchess and Browder.

QUESTION: You didn't cite them in your opening brief.

MR. LIEBMAN: We didn't. The State raised them, and we responded to them, and the point is that we actually think that Martinez-Villareal and Slack stand on top of Pitchess and Browder, so that they were obviously decided in that same context, and so we cited the more recent case, but in any event in our reply brief, what we point out is, this Court has been very clear to say, is there a conflict between a Federal Rule of Civil Procedure and the habeas jurisprudence?

If so, the civil rule doesn't apply. If not, it does apply, and as almost all of the courts of appeals have held, there are certain very limited circumstances when a 60(b) motion does not interfere with the policies of the habeas jurisprudence, and in those limited number of cases, which includes this one, it is appropriate to use 60(b).

QUESTION: Well, I thought the Second Circuit was the only case that really supported you --

MR. LIEBMAN: Oh, no.

QUESTION: -- in this area as to whether a 60(b) rule can be used as a substitute.

MR. LIEBMAN: No, Your Honor. We don't at all stand on the Second Circuit approach to this. The majority rule is that it is a case-by-case analysis. It's -- for example -- the Dunlap case where Judge Posner recently cited all of the lower court opinions, and what he said was, the majority rule is that you have to look. You have to say, is this the kind of 60(b) that avoids the problems that successive petitions are -- cause that we have a rule for? If they do, decide the 60(b) motion. If not --

QUESTION: How -- how long after the district court ruled that your claims were not -- not exhausted, how much time elapsed between then and the time you filed your Rule 60 motion?

MR. LIEBMAN: We filed the Rule --

QUESTION: 3-1/2 years, wasn't it?

MR. LIEBMAN: But it was the key point --

QUESTION: Just answer my question.

MR. LIEBMAN: Yes. Yes. Yes, Your Honor --

QUESTION: It was 3-1/2 years?

MR. LIEBMAN: -- I think 3-1/2 years is the right -- but the reason is that the trigger for the 60(b) motion did not come down until June 2001.

QUESTION: That's true, but the -- now I'm thinking, when I read the Sixth Circuit's opinion again, they're not really saying anything different. I think they must mean -- I grant you it can be read either way, but I can't believe that they mean every 60(b) motion no matter what is second or successive.

It seems to have arisen in cases where they had good reason to think that the 60(b) motion in that case was second or successive, as in your case they are looking at the 60(b) motion as a substitute for a new petition for the reason that it was dismissed the first time as a procedural default, which is the end of this matter.

MR. LIEBMAN: Well --

QUESTION: And you didn't appeal it. Rather, for whatever set of reasons, you wait -- I`mean, not saying it was your fault, but you wait and go back and do this other thing.

MR. LIEBMAN: Well, Your Honor, two points.

QUESTION: So is there -- is there really a minority rule at all?

MR. LIEBMAN: Well --

QUESTION: Is there some court that really meant it, that no matter what, 60(b) is always second or successive?

MR. LIEBMAN: That is the argument that the

State made here, and it's what the district court said, and I can tell you the district court believed it, but it doesn't matter here. I don't want to get off on that, because we think that whatever the rule ought to be, this is the kind of 60(b) motion that is not successive for two reasons.

First of all, it is -- it relies upon legal and factual issues that are entirely within the four corners of the original proceeding. There's nothing new here. The law, the facts, the evidence, everything is the same.

Secondly, so that means you're not getting out --

QUESTION: Well, the law's new. I mean, that's your whole point.

MR. LIEBMAN: Well, but it isn't new, Your Honor. It was a declaration of the law as it existed all the way back in 1967.

QUESTION: Well, all right, I'll --

MR. LIEBMAN: But it's like the Fiore case, Your Honor, where the Pennsylvania supreme court said yes, we came down with this interpretation of the State statute, and it's true the lower courts had all seen it differently up to that point, but we were telling you what the statute meant all the way back, and this Court treated it as, quote, old law.

QUESTION: But then you said you didn't need to put it in your -- make a cross-appeal of it because you didn't think it was a tenable argument, so you can't -- I don't -- I don't see how you could have it both ways, to say it was the law all along, but we didn't have to say that that was the law because O'Sullivan --

MR. LIEBMAN: Well, because --

QUESTION: -- hadn't come down, or had just come down.

MR. LIEBMAN: Well, Your Honor, what O'Sullivan says is, if there is a clear statement of law by State law, by rule or decision that says -- as the South Carolina-Arizona provisions cited in this paragraph say -- that this particular discretionary review procedure, quote, is not available, then the Supreme Court and the Federal courts will respect it, but otherwise, if we don't know what the law is, or it's not clear, then we don't need to respect it, so that was --

QUESTION: But the appellate -- the appellate brief in this case, the brief in the Sixth Circuit, when the -- when the prosecutor was appealing on the ineffective assistance of counsel, that was filed before O'Sullivan came down, wasn't it?

MR. LIEBMAN: The State's brief was filed before, petitioner's brief filed after.

QUESTION: But the point at which you could have filed a cross-appeal was before.

MR. LIEBMAN: Oh, Your Honor, that's a very important point. In our certificate of probable cause to appeal we asked the district judge, starting with point 1, the prosecutorial misconduct claims and the procedural default ruling on them is what we want to take up to the court of appeals on our appeal, and the district court granted a CPC -- a certificate of probable cause -- on that ground, so that was in the case, it was in the appeal, and it was specifically in the mind -- well, it was on the paper that this was the issue that the cross-appeal was going to be focused on.

QUESTION: I thought you didn't appeal. I thought you did not appeal the first time -- we're back in the year 2000, or early 2001.

MR. LIEBMAN: '99, actually.

QUESTION: '99?

MR. LIEBMAN: Yes.

QUESTION: All right. At that time I thought you did not appeal the district court's ruling that you had procedurally defaulted because you hadn't exhausted claims X, Y, and Z, and the time had run.

MR. LIEBMAN: Well, all I would say --

QUESTION: Am I right about that?

MR. LIEBMAN: You're right, but they were in the certificate of probable cause, which is -- you have to get that first, but of course the court of appeals doesn't reach your certificate of probable cause.

QUESTION: No, no, so I don't see how that helps you.

MR. LIEBMAN: Well, I'm just saying -- well, it does help in this sense, Your Honor, I think, which is that until O'Sullivan came down and removed the argument that petitioner thought he had, he was planning to raise it, but when O'Sullivan came down, after the CPC, but before he actually got to file his brief, now suddenly the claim that he wanted to raise looked frivolous, because there was not a declaration of State law on the point.

There came to be a declaration of State law, and when it came sua sponte, it happened to say, because the court in Tennessee believed that this to be -- was the case -- that the law of Tennessee has always been since 1967 that this was never part of the post-conviction review process, so --

QUESTION: Hasn't the Sixth Circuit had an opinion on that subject as to whether the rule promulgated by the Tennessee supreme court was a change, or was it not?

MR. LIEBMAN: No, it has not. The issue is percolating in the lower courts and in the Sixth Circuit, but it has not ruled yet.

QUESTION: But isn't the --

QUESTION: The Sixth Circuit did -- the Sixth Circuit had held before in a case arising out of Kentucky that if you don't go to the top court, you have not exhausted.

MR. LIEBMAN: They said that in Kentucky based upon a Kentucky supreme court decision in 1985.

QUESTION: Right.

MR. LIEBMAN: After that point, there are five or six decisions of the Sixth Circuit saying that failure to exhaust that remedy is failure to exhaust. There is no similar decision in Tennessee at all in the court of appeals before O'Sullivan came down, because the understanding of practice there, and I know because I practiced there at that time, was that this didn't need to be exhausted.

QUESTION: All right, so isn't the right way to do this, if you were writing it from scratch, we have the statute, you simply say, look, this is what second and successives are for. When the law changes just in the middle of the case, bring a second and successive. That's the rare case where it should be allowed.

MR. LIEBMAN: The law did not change.

QUESTION: I mean, I don't --

QUESTION: But I mean what happened to you. Isn't that the case that they're there for?

MR. LIEBMAN: This -- the second and successive is designed to avoid every change in the law being the basis for a habeas petition, but this is not a change in the law. It's exactly -- every petitioner literally argued that not only is this discretionary, so it should not be exhausted, but he also said the nature of this discretionary process shouldn't be exhausted because it's different from post-conviction.

QUESTION: Well, may I ask you one more question? If it had merely been a change in Tennessee law, that would not have been a predicate for a second and successive habeas, would it?

MR. LIEBMAN: Absolutely. If it is a change of law, it's preempted by the terms of the successive statute which says, we've got a rule here for changes in the law, but that's why this isn't successive, because this is not a change in the law, it's within the four corners --

QUESTION: But doesn't that foreclose you, because when you're -- if it's not second and successive as defined by AEDPA, that means those are the only kind

you can bring?

MR. LIEBMAN: No, Your Honor --

QUESTION: Not that you can pull something else in under Rule 60.

MR. LIEBMAN: No, Your Honor.

QUESTION: No --

MR. LIEBMAN: The State agrees if it's fraud, if -- Martinez-Villareal, where you've got some State court decision that changes everything --

QUESTION: Well --

MR. LIEBMAN: -- it's got to be --

QUESTION: -- are you suggesting there was fraud here?

MR. LIEBMAN: No, no, no, I'm saying, Your Honor, that there are certain circumstances where something that is literally second in time does not qualify as a second or successive petition that triggers 2244, and so we need to know what that is, and the two standards are when it is within the four corners of the first petition and it completely undermines --

QUESTION: Now, what's -- what's the authority for that statement?

MR. LIEBMAN: The authority is Martinez-Villareal, Slack, and Calderon, and a huge body of lower court law that establishes those very, very narrow

circumstances where it's so tied into the first petition because it's the same facts, and it so undermines that first judgment that there's no judgment left, that you need something to substitute for it, but you don't have a successive petition.

QUESTION: Thank you, Mr. Liebman. I take it you're reserving your time?

MR. LIEBMAN: Yes, I am.

QUESTION: General Summers.

ORAL ARGUMENT OF PAUL G. SUMMERS

ON BEHALF OF THE RESPONDENT

GENERAL SUMMERS: Thank you, Mr. Chief Justice, and may it please the Court:

This Court lacks jurisdiction of this case and the writ should be dismissed, but if this Court concludes that it does have jurisdiction, then the alleged 60(b) motion was a prohibited second or successive application because it attempted to revisit a prior final adjudication based upon alleged error of fact or law.

Turning to the jurisdictional issue, the court of appeals did not have jurisdiction to review the transfer order. The transfer order was not a final order. It had no jurisdiction in the district court. The district court had no jurisdiction over the -- over the motion because it considered it as what it was. It was a

second or successive application.

QUESTION: Doesn't the jurisdictional issue really turn on whether it was a second or successive?

GENERAL SUMMERS: No, Your Honor, it does not. Under the gatekeeping authority of 2244(b)(3) of AEDPA, then the sold province as to determine whether or not a second or successive application should be granted or should be denied is in the province of the Sixth Circuit.

QUESTION: But is it strictly in the province of the Sixth Circuit to determine that what it has before it is a request for something that should be called a second or successive petition within the meaning of the statute? If it is, they've got the final word, but whether it is is a separate question.

GENERAL SUMMERS: Your Honor, our position is that you can't separate these two functions. Under AEDPA, and under the clear enactment of Congress, when Congress gave the court of appeals the exclusive and sole jurisdiction as to whether or not a -- an application or leave for application for a second or successive should be granted or denied, it also gave them the exclusive authority to determine whether it was --

QUESTION: Well, it didn't do so in so many words. I mean, is your argument that if we split this question into a) jurisdictional fact, b) the authority of

the court if the jurisdictional fact is present, if we split those two questions that there's going to be constant litigation over the jurisdictional fact, and that's why we ought to read the statute your way, or is there some point of text that is not occurring to me that supports you?

GENERAL SUMMERS: Absolutely, Your Honor.

QUESTION: Well, it's one or the other.

GENERAL SUMMERS: Well --

(Laughter.)

QUESTION: Is it text or policy?

GENERAL SUMMERS: It's the first one, Your Honor.

QUESTION: Okay.

GENERAL SUMMERS: If you were to split those two decisions that the court of appeal has jurisdiction over, then there would be a proliferation of appeal of that first predicate decision. The decision, the first --

QUESTION: Well, is it going to be -- I mean, is it going to be a difficult question in most cases? I mean, this is an extraordinary case. You can see how the jurisdictional fact question gets raised here, but you know, in most cases is this going to be even a colorable issue?

GENERAL SUMMERS: Your Honor, I don't -- I would

not -- I don't think this is, frankly, an extraordinary case to determine whether or not it was a second or successive. That is to say that when the Sixth Circuit got the transfer order, they saw just what it was, and that it was a second or successive application --

QUESTION: Yes, you say that, but the relief sought in the 60(b) motion was not relief from the State court judgment. It was relief from the final judgment in the habeas proceeding because of the Tennessee rule, so they asked to reopen the habeas proceeding, not to file a second habeas proceeding, and they asked to reopen it, and just to have a claim which was undecided in that proceeding decided, which had never been decided, so there was not asked for second consideration of a claim, just for the first consideration.

GENERAL SUMMERS: Yes, Your Honor. What they asked for was the relitigation of a claim that had been -- that -- that --

QUESTION: Not of a claim, a first litigation of a claim.

GENERAL SUMMERS: They -- they asked for -- they asked for the relitigation of a prior final determination, which we -- we submit and we -- our position is that this was, in fact, a second --

QUESTION: Did they ask in the 60(b) motion for

relief from the State court judgment which would be the relief requested in the habeas proceeding?

GENERAL SUMMERS: They asked -- I'm sorry.

QUESTION: Did they ask for relief from the State court judgment in the 60(b) motion, or just from the habeas court judgment?

GENERAL SUMMERS: They asked for relief from the -- from the habeas judgment in the -- in the district court --

QUESTION: So then it was a 60(b) motion, because that's what 60(b) is directed at, where the second or successive petition would have asked for relief from the State court judgment.

GENERAL SUMMERS: Well, they alleged that it was a 60(b) motion, but when the district court received the motion, the district court put substance over form and saw clearly that it was a second or successive --

QUESTION: Well, you call it that, but supposing instead of the -- the Tennessee rule, they had been able to demonstrate it -- very improbable, just to give the hypothesis out -- that a waiver of the claim for the prosecutorial misconduct had been executed and the waiver was false, that there was a fraud on the court in -- in having that issue precluded from review. Would a 60(b) motion have been permissible then?

GENERAL SUMMERS: It would be the inherent authority of the -- of the district court to take care of a situation of fraud on the court.

QUESTION: By granting a 60(b) motion?

GENERAL SUMMERS: Well, we don't think it would even have to be a 60(b) motion.

QUESTION: Well, wouldn't that be the office of a 60(b) motion, to correct that very fraud?

GENERAL SUMMERS: Fraud on the court that would impugn the very integrity of the prior final adjudication would, in fact, be -- be --

QUESTION: Well, you go on a different section of Rule 60, wouldn't you --

QUESTION: That's correct.

GENERAL SUMMERS: Yes.

QUESTION: -- the section of Rule 60 that specially deals with fraud.

GENERAL SUMMERS: That's right.

QUESTION: But in that situation a 60(b) motion would be permissible under that section?

GENERAL SUMMERS: If there was a fraud on the court.

QUESTION: Right.

GENERAL SUMMERS: But that -- but the fraud on the court would undermine the complete efficacies of the

proceedings, and that the final judgment wouldn't even be final, because it would be a sham.

QUESTION: Well, but you have to file a motion and have those facts developed in order to do it, and 60(b) is the avenue for doing that.

GENERAL SUMMERS: That -- I mean, that could be a possible avenue, but that -- but that would only go as to the fraud on the integrity --

QUESTION: And here, the relief requested is precisely the same, namely that one claim was not heard which was in the case, for a reason that was -- turned out to be a gross mistake of the law. They thought the law was exhaustion because of a rule of law, and it turns out they were wrong, so you have -- instead of fraud, you have a mistake of law.

Now, maybe that doesn't -- doesn't justify 60(b) relief, but it certainly is a classic case of what 60(b) is directed to -- to solve.

GENERAL SUMMERS: Well --

QUESTION: Directed at the final judgment in the habeas proceeding as opposed to the final judgment in the State proceeding.

GENERAL SUMMERS: Of -- of course, Your Honor, that argument would fly in the face of the finality requirements of AEDPA, which only -- which only gives

us -- which only gives us limited circumstances to relitigate --

QUESTION: But that's true of my fraud case, too.

GENERAL SUMMERS: Well, but in the fraud case, Your Honor, the fraud on the court means that the original judgment is a complete sham, is a complete sham, and there was no --

QUESTION: And here it isn't a sham, it was just a mistake. They misread the law.

GENERAL SUMMERS: Well, they want it both ways, if it please the Court. They either say that it was a new rule or an -- or an old rule that clarified Tennessee law. If it was a new rule, then that would contravene 2244(b) under AEDPA.

QUESTION: But that --

QUESTION: What is the right way to do it? That is, in your opinion, how -- suppose we had a -- we have a defendant, a petitioner, a convicted person, and he has a whole lot of claims, and there he is in Federal court and he brought all of his claims up to the State supreme court but for three, then he suddenly thinks, oh my God, I wish I'd brought those up, too, and the district judge says, well, you sure had to, so you lost them, because it's too late now. Procedural default. It seems obviously right,

doesn't even appeal that part of the case.

But while the case is on appeal, this Court says, he didn't have to go to the State supreme court with those three claims if the State supreme court agrees, and then State supreme court then does.

All right. Now, there he is. Under the law as it is right now, he can make his three points. He can make his three claims, and yet as it was before, he couldn't, and it's right on the case, it's still ongoing. What's supposed to happen?

GENERAL SUMMERS: When the --

QUESTION: In your opinion is there just -- is there no way a person could say, judge, please read the supreme court and the Tennessee court, and you'll see that your ruling was wrong, and believe me, that's right, so what is he supposed to do?

GENERAL SUMMERS: A prior final determination -- a prior final determination by the district court as to the procedural default should be conclusive.

QUESTION: So you're saying he's just out of luck, nothing?

GENERAL SUMMERS: Yes, sir, because -- because --

QUESTION: It seems terribly unfair --

GENERAL SUMMERS: Well, but we -- yes, Your

Honor, but under the provisions of AEDPA there are two circumstances where he could file a second or successive, which we say is what he has, in fact, done here. One, of course, is if it's a new claim involving a constitutional law that's made retroactive by this very Court, or newly-discovered evidence to show factual innocence, but when that court -- when that district court -- makes a final, a prior final adjudication, then that is -- that should be -- that should be final. He should appeal that decision. He should appeal that decision --

QUESTION: General Summers --

GENERAL SUMMERS: -- through the normal appellate process.

QUESTION: General Summers --

GENERAL SUMMERS: He did not in this case.

QUESTION: You -- are you -- you're making the general point that's not peculiar to AEDPA? I -- tell me if my understanding is correct -- that 60(b) is not supposed to do service in place of an appeal.

GENERAL SUMMERS: Yes, Your Honor.

QUESTION: So if a district court rules incorrectly, and you didn't appeal that, and then there's a clarifying decision by some other court that really shows the district court was incorrect on the procedural default, you can't then say, ah, give me the relief under

60(b) that I could have gotten if I had taken a timely appeal.

GENERAL SUMMERS: Yes, Your Honor. If the --

QUESTION: And that's wholly apart from AEDPA.

GENERAL SUMMERS: Yes, Your Honor, that's correct. If this petitioner had decided that instead, the district court found that he had improperly exhausted his remedies under State law, that he'd showed no cause of prejudice or fundamental miscarriage of justice, that he had procedurally defaulted, and that he, his claim was -- it was conclusive that he had no habeas relief, if the petitioner had wanted to appeal that -- had wanted to find out whether or not the district court was wrong -- he should have appealed that case. He did not. Under -- under the case law but also under 60(b) doctrine a 60(b) motion is not a substitute for an appeal. He did not appeal that adjudication by the district judge. He's out of business so far as that's concerned.

What he filed in the district court, the district judge got that document, he looked at substance, and the district court said, this is a second or successive. The only jurisdiction in the world to determine whether to grant or deny second or successive is the court of appeals. When that court of appeals got that transfer order, there was no termination. They got what

was --

QUESTION: Is it conceivable that a district judge might erroneously in some case call something second or successive and it really wasn't? Is it ever possible for him to do -- make that?

GENERAL SUMMERS: Well, human beings, it's certainly possible.

QUESTION: And if he does make a mistake, what's the remedy for it?

GENERAL SUMMERS: There could be a motion to transfer in the court of appeals. The court of appeals if, in fact, finds that it was improvidently transferred, could transfer it back. That would be that remedy, Your Honor.

QUESTION: But what if instead -- I gave you a fraud example -- instead of that it was a mistake. The judge thought that the petitioner had waived the case. They thought there was a document in the file waiving this issue and he was just dead wrong, and he said, then the -- after the decision -- the final decision in the habeas case, the judge -- the litigant finds out that the judge incorrectly relied on a mistaken representation of fact. Could he not file a 60(b) to correct that?

GENERAL SUMMERS: No, Your Honor. If it was a mistake of fact, if it did not go to -- to undermine the

integrity of that being a final adjudication, no.

QUESTION: Well, it -- it undermines it in the sense that it denied the litigant a hearing on a claim asserted in the habeas proceeding, namely, the prosecutorial misconduct. He just never got a hearing on that.

GENERAL SUMMERS: If he were -- if it were something of the nature of -- of denying him the opportunity to have a hearing, or if, in fact --

QUESTION: That's exactly what it was here, too.

GENERAL SUMMERS: Well, no, sir. He did -- he received a hearing. He received a hearing, Your Honor, that -- and in that hearing it was determined by the court that he had improperly --

QUESTION: He failed to exhaust.`

GENERAL SUMMERS: -- Failed to exhaust -- improperly, that he --

QUESTION: And that ruling was wrong.

GENERAL SUMMERS: -- failed to show cause of prejudice, that there was no miscarriage of justice, and that he was conclusively entitled to no habeas relief in the district court, and that was a conclusive final determination, and if he had felt like the court was wrong, he should have filed an appeal in the Sixth Circuit.

QUESTION: Well, I understand that argument, but if -- but I don't understand your position if it was based on a mistake of fact, rather than a mistake of law. Here was just a clear mistake of law. The parties all misunderstood what the law, as later explained by the Tennessee court, was. It was -- he did not -- he had, in fact, exhausted.

GENERAL SUMMERS: Your Honor, if he had thought the judge had made a mistake, he should have appealed.

QUESTION: He didn't think so. He didn't know that 'til Tennessee adopted its rule --

GENERAL SUMMERS: Well --

QUESTION: -- which was 2 years later.

GENERAL SUMMERS: Well, his argument that Tennessee adopted a rule that either is a new rule or an old rule is not of much import as far as we're concerned, because the Rule 39 that he relies upon changed nothing in Tennessee law --

QUESTION: Right.

GENERAL SUMMERS: -- so far as appellate process.

QUESTION: But they changed the understanding of the district judge and the litigants. They thought the law was otherwise.

GENERAL SUMMERS: Well, I think -- I think the

district court knew what the law was when he made that decision, but certainly the Sixth Circuit knew what the law was.

QUESTION: You think he knew what the Tennessee court was later going to decide?

GENERAL SUMMERS: Well, actually, the --

QUESTION: Because what he did is flatly inconsistent with what the Tennessee court decided.

GENERAL SUMMERS: What the Tennessee court later decided, Your Honor, did not change Tennessee law so far as discretionary review at all -- at all.

QUESTION: But it did demonstrate, did it not, that the district judge was wrong in his ruling on exhaustion?

GENERAL SUMMERS: The district jùdge was exactly correct on his decision.

QUESTION: That's the question. That's the ultimate question that I think this Court granted cert to decide, but then we discovered that there are all these -- this procedural -- the question whether a Tennessee court saying you don't have to exhaust does service for the Federal courts. That is, the Federal courts could say it's an open question.

You have to exhaust the remedies that are available to you. You could have requested review. You

didn't request review. We don't care if Tennessee says, ah, you don't have to, because that's -- that ruling would be made only for purposes of saying, let's get into the Federal court. I take it that's your position.

GENERAL SUMMERS: The decision as to the availability of a remedy is a State decision. The decision as to what has been exhausted is a Federal decision, Your Honor.

QUESTION: Yes.

GENERAL SUMMERS: The Rule 39 that the petitioner relies upon did not change discretionary review in Tennessee one iota. As a matter of fact, the Tennessee Rule of Appellate Procedure 11 says in its comment that Rule 39 does not change TRAP -- as we call it, TRAP 11 -- whatsoever. Discretionary review was in '95, when he did not appeal to the supreme court, as well as in June 28, 2001, an absolute available remedy under the normal appellate processes in Tennessee.

QUESTION: So on your view, the district court was right when the district court said the first time around, sorry, you didn't exhaust.

GENERAL SUMMERS: Your Honor, our view is that the district court was right in 1998 when he ruled that the claims were procedurally defaulted, and if this case -- if this case were to go back to the district court

today, he would rule that the claims had been procedurally --

QUESTION: Well, that -- we don't know that because I think it's an open question whether -- after O'Sullivan -- the position taken in O'Sullivan would apply when the State court says you don't have to exhaust.

GENERAL SUMMERS: But there's no question that -- there is no question that in 1998, when the district court found that the -- that the issues had been procedurally defaulted, and that there had been no showing of cause in prejudice, no miscarriage of justice, that that was a conclusive final determination.

What this -- what this petitioner attempts to do is to -- under the guise of a post-judgment pleading -- avoid or evade the second or successive restriction. This flies in the face of AEDPA, would be a mockery of the finality requirements of AEDPA, and we would submit to the Court that the transfer to the court of appeals was a proper transfer, and that the court of appeals properly determined the gatekeeping criteria was satisfied, the writ should be dismissed or, in the alternative, the decision of the court of appeals should be affirmed.

QUESTION: Thank you, General Summers.

Mr. Zidlicky, we'll hear from you.

ORAL ARGUMENT OF PAUL J. ZIDLICKY

ON BEHALF OF AMICI CURIAE, STATE OF ALABAMA, ET AL.

MR. ZIDLICKY: Mr. Chief Justice, and may it please the Court:

I'd like to start by first responding to Justice Stevens' question, in which he said that the Rule 60(b) motion didn't seek the relief of granting of Federal habeas. It actually did. In the joint appendix in 170, the court -- the petitioner sought relief from the State court judgment in bullet point -- I believe it's five, but in any event, I think underlying that is the question of whether there had been a prior --

QUESTION: You say the 60(b) motion was directed at the State court judgment, is that what you're telling me?

MR. ZIDLICKY: Yes. Yes, Justicè Stevens.

QUESTION: And not at the habeas -- not asking the habeas court to vacate the ruling on the -- on -- denying habeas and setting it down for a ruling on the -- on the prosecutorial misconduct?

MR. ZIDLICKY: For both. For both, Justice Stevens. He asked for both of those, and I think -- he sought to reopen the judgment, and he also sought -- he sought in bullet point 5 to -- or, relief from the State court judgment, and that's in the joint appendix.

The question --

QUESTION: But 60(b) just gets him the first step, and if he succeeds in the first step, then he goes further and says, okay, relieve me from the State court judgment.

MR. ZIDLICKY: Well, I was just responding just to Justice Stevens' point that he didn't seek that relief in his Rule 60(b) motion. He actually did, but the -- but the underlying question is --

QUESTION: But he's doing it simply because he is saying, I guess, that's where I'm trying to get to ultimately.

MR. ZIDLICKY: What he's trying to do is, he's trying to relitigate a claim that had been adjudicated against him through Rule 60(b), and this Court said in Calderon that you can't -- that the requirèments of 2244(b) can't be evaded, and one of those requirements is, you can't relitigate a claim that has been adjudicated.

QUESTION: Well, he's not relitigating a claim that's been adjudicated, he's relitigating -- he wants to litigate a claim that had not been adjudicated. He wanted a ruling on the merits of his claim, which he never got.

MR. ZIDLICKY: No, Justice Stevens, there was an adjudication of his claim. There was an adjudication of his claim by the district court which said his claim was procedurally defaulted --

QUESTION: Yes.

MR. ZIDLICKY: -- and that he had failed to establish cause and prejudice, and that --

QUESTION: Correct, but they didn't get a ruling on the merits of the claim.

MR. ZIDLICKY: No, he --

QUESTION: They just ruled that it was procedurally defaulted because it had not been exhausted.

MR. ZIDLICKY: Well, that's -- but I don't think that's right, Justice Stevens. In this Court's cases in Stewart and Slack, the Court made clear that in determining whether there had been a prior -- the language that the Court had used was whether there had been a prior adjudication of the claim. Here, there was a prior adjudication of the claim. This Court's precedent, going back to Wainwright v. Sykes, Coleman v. Thompson, and --

QUESTION: But the adjudication to which you refer is a holding that it was procedurally defaulted because the -- they had not been exhausted in the supreme court of Tennessee. Is that not correct?

MR. ZIDLICKY: That's correct, Justice Stevens.

QUESTION: And that amounts to an adjudication on the merits, but in fact, the merits had never been decided.

MR. ZIDLICKY: No, it is -- it's an adjudication

for purposes of -- it's -- for purposes of determining whether he can come back and file to relitigate the issue, come back and --

QUESTION: Right, it's an adjudication that has finality, which merits adjudications usually do, but it's a finality adjudication that does not rest upon any finding about the underlying merits of the claim that he wanted to bring for relief. Isn't that clear?

MR. ZIDLICKY: That's not the test that this Court has adopted in --

QUESTION: I'm not asking you whether it's -- I'm just asking you as a descriptive matter --

MR. ZIDLICKY: I don't -- you're right, Justice Souter, he didn't make a determination regarding the underlying merit of the constitutional claim, but --

QUESTION: Okay, and we use the term, I think -- correct me if I'm wrong, we use the term, merits determination, to refer to a determination that is binding, i.e., he can't do something back in the State court and then come back and try again here. We call that a determination on the merits, but there are two kinds of merits determinations.

One is a finding of default which cannot be cured. Second is a finding which may involve default, but may involve a determination on the merits of the

underlying claim, and this is just a default kind of merits, not an underlying claim kind of merits finality, isn't that correct, just as a descriptive matter?

MR. ZIDLICKY: I think it's correct as a descriptive matter to -- but with one qualification. What you're saying is that there is an exception for -- I think in substance what you're saying is, you can continue to relitigate claims of procedural default because they're, quote, not on the merits, but I think the way --

QUESTION: Well, maybe you can and maybe you can't. His argument here is, this is one that I ought to be allowed to relitigate, i.e., to litigate despite a finality judgment, because of something very unusual that happened as a result of the supreme court's rule change.

What he's saying is, this is a special kind of -- third kind of case in the middle, and you want to treat this one for 60(b) purposes like a nonfinal determination. I think that's the argument.

MR. ZIDLICKY: Justice Souter, and perhaps this -- this is -- I don't think this is an exceptional case in this regard. When he went back --

QUESTION: Well, he may be wrong that it's an exceptional case, but that's the argument that he's making, isn't it?

MR. ZIDLICKY: Well, the argument that he's

making is, he's entitled to relitigate a claim that has been adjudicated against the --

QUESTION: No, he's not making that blanket statement. He's saying that in a case like this, in which the finality which is claimed does not rest on a merits determination, I ought to have a chance under 60(b).

MR. ZIDLICKY: Well, I do think that this is -- this case is fundamentally different than the case in Stewart and Slack. In those cases, what the court had determined was, it wasn't a second or successive habeas petition. You weren't seeking to relitigate, and the reason was because you'd never received an adjudication of the case at all. The court didn't say no to your habeas claim. It said, not yet.

In Slack, the court said, go -- go exhaust. In Stewart, the court said, the case is not ripe. Here what the court -- here what the court -- the district court told him was, they didn't say not yet, the court said no, you're going to lose, and you're going to lose based on precedent from this Court starting with Wainwright v. Sykes.

Really what they're asking is for an -- a loophole to this -- to the requirement for second and successive petitions for procedurally defaulted cases, and if that's the loophole, then there's no way to distinguish

that from abuse of -- abuse of the writ cases, because in both instances, you can make the argument that there wasn't any ruling on the substantive merits, but there was a ruling, and the one that's important was, he received an adjudication, and if he disagreed with that adjudication he should have --

QUESTION: Could you describe for me what portion of Rule 60(b) is still operative with reference to mistakes, given AEDPA? Does AEDPA completely supersede Rule 60(b) with reference to the category of mistakes and, if not, how would you characterize or describe for us what remains of Rule 60(b)?

MR. ZIDLICKY: I think what -- the analysis that the Court would have to determine is whether there had been an adjudication. If later on there's a claim, after the court has decided the issue, that there was a mistake of fact or a mistake of law, the question is, are you trying to relitigate the issue, and if that's the case then 60(b) wouldn't apply.

But if you're saying that there was never adjudication in the first place for the example of a judge who had been bribed in the first Federal habeas proceedings, you would say, well, that's not a second or successive habeas application --

QUESTION: As to anything that's been

adjudicated, the category of mistakes is removed from Rule 60(b) when AEDPA is in the picture?

MR. ZIDLICKY: I think if there's been an adjudication, and I think that's the sense that -- in your decision in Slack -- that's the underlying issue.

Now, it -- that doesn't mean that there's no relief. You can -- you can try to seek to file a second or successive habeas application, but this Court in Davis versus Pitchess made clear that Rule 60(b) is not a way of circumventing the requirements of AEDPA, and you in Calderon made clear that what AEDPA prohibits is the relitigation of a claim that had been adjudicated, and that's exactly what we have in this case. There had been an adjudication. He claims that it was wrong.

QUESTION: I think -- I think you're saying that if there's an adjudication, there's no room for a 60(b) motion predicated on a mistake. That's your submission?

MR. ZIDLICKY: That is my submission. I don't think there was a mistake here. I --

QUESTION: I understand, but that's your submission. In construing Rule 60(b), it simply does not apply if there's been an adjudication, but my suggestion to you is that the only time 60(b) applies is when you've got a judgment you want to reopen.

MR. ZIDLICKY: Well, Your Honor -- and the

reason that 60(b) -- you know, one of the arguments that petitioner makes here is, they say that, well, these claims will rarely be granted so you don't have to worry about it, but the -- but what AEDPA requires is, it says these claims are -- the -- if you're trying to relitigate a second or successive habeas application, what it does is, it takes that away from the district court completely, the delay in the costs that are associated with that relitigation.

QUESTION: I agree with everything you say if you are correct in classifying a particular judgment -- I mean, a particular claim as a second or successive claim.

MR. ZIDLICKY: Right.

QUESTION: There are some cases, I think, when that classification does not fit the facts.

MR. ZIDLICKY: But I think, though, a determination of procedural default falls in the heartland of habeas jurisprudence, and it's the heartland of a determination that you're not entitled to relief. In Slack and in Stewart --

QUESTION: So in your view, 60(b) necessarily has a much more narrow application in AEDPA cases than in other cases, or in habeas cases than in other cases?

MR. ZIDLICKY: Yes, Justice -- Justice Kennedy, I think that's right, and I think the reason why is

because, as this Court explained in Davis versus Pitchess, you can't use 60(b) to circumvent the substantive requirements of --

QUESTION: Well, what do they really intend in Congress if, for example, the court comes up with an interpretation of a statute that shows the defendant didn't commit a crime, and there he is in habeas. He's got a final ruling, denied. Lo and behold the Supreme Court comes up with a case to say, you never committed a crime. He looks at AEDPA. He can't find it's a second or successive because it says, constitutional ruling. What's he supposed to do? Nothing? And do you think Congress meant that there was no remedy at all?

MR. ZIDLICKY: I think -- I think what Congress did was, it -- it did identify the criterià that -- that a district court would look to in determining -- it defined that criteria, but the one -- the one place that you could look to is, you could then go back to this Court's original jurisdiction under 2241 for those exceptional circumstances.

QUESTION: Thank you. Thank you, Mr. Zidlicky.

Mr. Liebman, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF JAMES S. LIEBMAN

ON BEHALF OF THE PETITIONER

MR. LIEBMAN: I would like to direct the Court's

attention to pages 12 and 13 of our reply brief, the yellow brief. On those pages, in the footnote in the text there are a number of cases that are cited. Every single one of those cases is a 60(b) case in a habeas or 2255 situation where 60(b) was granted, relief was granted and it was determined that this was not a second or successive petition.

In each one of those cases, the reason was mistake of law, the U.S. Supreme Court or some other court came down with a new decision, and in every one of those cases, that issue was not raised on direct appeal to the court of appeals. It came back on a 60(b). In each case they had to adjudicate the question of whether it was reasonable for them not to have raised it in the court of appeals at that time, and in each case they did on the ground that the new decision that came down changed everything, and it suddenly made what looked like a frivolous claim at that time into what was not a frivolous claim, but, indeed, one on which there was at least a right to adjudication on the merits.

In some cases they won, in some they lost when they went to the merits after they got their 60(b) relief, but the fact is that those cases, including this Court's GVR in Blackmon v. Money, which was a 60(b) case on a successive, or a second, not a successive but a second

habeas petition, were cases where they had not been raised on appeal, but they -- they were determined to be at least potentially ones where there was a reasonable basis for not having done it, and frivolousness, not making frivolous claims is such a basis. This Court in Gomez and other cases has been particularly emphatic that habeas petitioners should not -- especially in capital cases -- should not be raising frivolous claims.

The second thing I want to point to is that the 2244(b)(3)(E), which says that there is no -- it not only says the Supreme Court can't take a cert petition, it says that rehearing petitions can't be held in the court of appeals, but the court of appeals are unanimous in saying, if the question is whether this is a second or successive petition, that can be reheard. That's not governed by 2244(b)(3)(E).

We can separate that question out, and we can decide that, and it's exactly the same thing here. The key case there is Mancuso in the Second Circuit, 166 F.3d 97, so the courts have been separating out those questions, saying if it's a question of jurisdiction --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Liebman. The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)